STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 790, AFL-CIO, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-18-M PERB Decision No. 1608-M March 22, 2004

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Jr., Attorney, for Service Employees International Union, Local 790, AFL-CIO; Martin R. Gran, Deputy City Attorney, for City & County of San Francisco.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Service Employees International Union, Local 790, AFL-CIO (SEIU) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the City & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally assigning new duties to Senior Clerk/Typists. The Board agent dismissed the charge on the ground that since the new duties were reasonably related to existing duties, the assignment was not within the scope of representation.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, SEIU's appeal, and the

[1]MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

City's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

The Board has held that the assignment of duties is not a mandatory subject within the scope of representation if the newly assigned duties are reasonably related to existing duties. (Davis Joint Unified School District (1984) PERB Decision No. 393 (Davis); Rio Hondo Community College District (1982) PERB Decision No. 279 (Rio Hondo).) SEIU notes that Davis and Rio Hondo were cases decided under the Educational Employment Relations Act (EERA)[2] and that the scope of representation under the MMBA is broader. SEIU also argues that "work assignments" have been found to be negotiable under the National Labor Relations Act (NLRA).[3] However, as the Board agent noted, the cases cited by SEIU do not support either of its arguments. Next, SEIU argues that even if the assignment of duties is not a mandatory subject of negotiation, it is at least a permissible subject. SEIU notes that the City willingly entered into negotiations regarding the assignment of duties and that an agreement was reached. The City then committed an unfair practice by unilaterally breaching that agreement, according to SEIU.

In dismissing the charge, the Board agent failed to address the legal effect, if any, of the purported agreement between SEIU and the City. The issue is whether the City committed an unlawful unilateral change when it breached that agreement regarding a permissive subject. In

[2]EERA is codified at Government Code section 3540 et seq.

[3]NLRA is codified at 29. U.S.C. 151 et seq.

Eureka City School District (1992) PERB Decision No. 955 (Eureka), the Board addressed this issue with respect to a district's policy on smoking. There, the Board held that:

> Matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring. [fn. omitted.] Although employers retain the right to meet and consult with employee organizations on any subject outside the scope of representation, the parties are not required to bargain over a permissive subject. However, once agreement is reached concerning a permissive subject and it is embodied in the parties' CBA, the parties are bound by the terms of the agreement until its expiration or unless modified by the parties.
>
> The employer retains its management prerogative over subjects outside the scope of representation. Further, by once bargaining and agreeing on a permissive subject, the parties do not make the subject a mandatory topic for future bargaining. (Chula Vista City School District, supra, PERB Decision No. 834; Poway Unified School District, supra, PERB Decision No. 680.) The nature of a permissive subject of bargaining permits an employer or an employee organization to indicate prior to the expiration of the agreement that it does not intend to bargain the nonmandatory subject. [Emphasis added.]

Thus, Eureka recognizes that there is no obligation on either party to negotiate over permissive subjects of bargaining. However, once an agreement is reached regarding a permissive subject and it is embodied in the parties' CBA, the parties are bound to that agreement for its duration. Once the agreement has expired there is no obligation to adhere to the agreement or bargain over a new one.

Here, SEIU alleges that an agreement was reached with the City not to assign certain duties to class 1426 employees until the computer system functioned properly. It is undisputed that the purported agreement between SEIU and City was not embodied in the parties' CBA and no term was set forth in the agreement. Further, no modification was made to documents setting forth the duties of senior clerk/typists.

At some point, management again assigned those duties to its senior clerk/typists. Since the duties at issue were reasonably related to existing duties, the agreement solely involved a permissive subject of bargaining. Because that agreement involved a permissive subject of bargaining, and was not embodied in the parties' CBA, the City did not commit an unlawful unilateral change when it again assigned those duties to its employees. (Eureka.) Accordingly, the Board agent properly dismissed the charge.

ORDER

The unfair practice charge in Case No. SF-CE-18-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

Dismissal Letter

August 2, 2002

Vincent Harrington, Jr., Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: Service Employees International Union, Local 790, AFL-CIO v. City & County of San Francisco
Unfair Practice Charge No. SF-CE-18-M
DISMISSAL LETTER

Dear Mr. Harrington:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on . The Service Employees International Union, Local 790, AFL-CIO alleges that the City and County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the duties of Class 1426 employees and by refusing to meet and confer over the implementation of the Child Welfare Services/Case Management System (CWS/CMS).

On April 26, 2002, I called you and left a message stating that I had concerns about the sufficiency of your the charge. I informed you that I would send you a warning letter and invited you to call if you had questions. You did not call to discuss the charge.

In my letter dated April 26, 2002, I indicated that your charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that unless you amended the charge to state a prima facie case or withdrew it prior to May 14, 2002, the charge would be dismissed. Your request for an extension of time was granted and an amended unfair practice charge was filed on May 17, 2002.

In early 2000, the parties negotiated over implementation of the CWS/CMS and reached an agreement in March 2000. A copy of the parties' final written agreement was not included in the charge. However, assuming the parties had a valid agreement that Senior Clerk/Typists would not be required to enter contacts into the CWS/CMS, as discussed in the attached letter the assignment of duties is not a mandatory subject within the scope of representation if the newly assigned duties are reasonably related to existing duties. (Davis Joint Unified School

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

District (1984) PERB Decision No. 393 (Davis); Rio Hondo Community College District (1982) PERB Decision No. 279 (Rio Hondo).)[2]

You contend that "work assignments" have been found negotiable under the MMBA and the NLRA, citing the following cases. In Los Angeles County Employees Association v. Los Angeles County (1973) 33 Cal.3d 1, the Court determined that the size of caseload carried by eligibility workers is a negotiable subject. In Independent Union of Public Service Employees v. County of Sacramento (1983) 147 Cal.App.3d 482, the Court found the assignment of workshifts, a change in the time that custodian shifts started and ended, was a mandatory subject of bargaining. In AMF Bowling Co. (1991) 3003 NLRB 167, 138 LRRM 1017, the "work assignment" found negotiable was a transfer of work out of the bargaining unit by assigning bargaining unit work to non-unit employees. Finally, in Engineered Control Systems (1985) 274 NLRB 1308, 119 LRRM 1038, the NLRB held that a unilateral change in the work duties of employees in the "helper" classification violated the NLRA. However, the NLRB did not describe the change in assigned duties and it is arguable that these duties were assigned to an employee who was removed from the bargaining unit and hired as an independent contractor.

These cases do not find negotiable the assignment of duties to employees. Under similar labor relations statutes, PERB has long held that the assignment of work, if reasonably related to existing duties, is a management prerogative. (Davis; Rio Hondo) Thus, when the City assigned the duty to enter contacts into the CWS/CMS to Senior Clerk/Typists, Class 1426 employees, this conduct did not violate the MMBA.[3]

Your charge also alleges that the City refused to meet and confer over the implementation of the CWS/CMS.

During the summer of 2001, the City began requiring Senior Clerk/Typists to enter contacts into the CWS/CMS. When the Union became aware of this change, SEIU Field Representative Faye Roe made a demand to bargain the matter on August 23, 2001. Employee Relations Manager Patricia Burns responded in a letter dated September 25, 2001, stating that the City believed that discussions on the matter had been "exhausted." Ms. Burns stated that the City did not have an obligation to meet and confer because the introduction of the CWS/CMS did not significantly change employee working conditions.

In a letter dated October 1, 2001, Ms. Roe reminded Ms. Burns that the parties had previously negotiated and reached an agreement over implementation of the CWS/CMS. Ms. Roe

---

[2] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

[3] Even excluding the April 27, 1998 Senior Clerk/Typist duty statement, the description of the duties of Senior Clerk/Typists from the "Characteristics of the Class" document demonstrates that employees in this class perform related work.

demanded that the City cease requiring clerks to perform the disputed job duties, halt training on the CWS/CMS and meet and confer over these matters.

As discussed above, the assignment of work is not a matter within the scope of representation. An employer does not have an obligation to meet and confer over nonmandatory subjects of bargaining. (Building Material and Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 660, 224 Cal.Rptr. 688.) Thus, the City did not violate the MMBA when it refused SEIU's request to bargain the decision to require clerks to enter contacts into the CWS/CMS.

An employer is required to meet and confer over any negotiable effects of its decision. However, a request to bargain effects must clearly identify the bargainable impacts. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.)

On August 23, 2001, Ms. Roe made a demand to bargain after the Union learned that the City began requiring clerks to enter contacts into CWS/CMS. Ms. Burns responded on September 25, 2001, stating that the City did not have an obligation to bargain this matter. Ms. Roe again demanded to bargain in her October 1, 2001 letter, but she did not identify for the City the negotiable effects of the implementation of the CWS/CMS which the Union sought to negotiate. Ms. Roe did not clarify for the City that it sought to bargain the effects of its decision to require Senior Clerk/Typists to enter contacts. Absent a specific demand to bargain identified impacts, Ms. Roe's request to bargain was reasonably interpreted to be a general demand to bargain the City's nonnegotiable decision. This is especially true given that the parties had exhaustively negotiated over the implementation of CWS/CMS and its impacts. Accordingly, this allegation also fails to state a prima facie case and is dismissed.

Right to Appeal

Pursuant to PERB Regulations,[4] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Regulations 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the

[4] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Philip A. Ginsburg

Warning Letter

April 26, 2002

Vincent Harrington, Jr., Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, CA 94612

Re: Service Employees International Union, Local 790, AFL-CIO v. City and County of San Francisco
Unfair Practice Charge No. SF-CE-18-M
WARNING LETTER

Dear Mr. Harrington:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on . The Service Employees International Union, Local 790, AFL-CIO alleges that the City and County of San Francisco violated the Meyers-Milias-Brown Act (MMBA)[1] by unilaterally changing the duties of Class 1426 employees and by refusing to meet and confer over the implementation of the Child Welfare Services/Case Management System.

The charge makes the following factual allegations. SEIU Local 790 is the exclusive representative of numerous miscellaneous employees, including certain clerical employees of the City and County of San Francisco, Department of Human Services. As a result of State legislation, the City was required to implement a new computer-based case management system for Child Welfare Services (CWS/CMS) in October 1997. The new system permits access to the information entered into the system by the State and other participating agencies. The CWS/CMS requires significant changes in the way case files and data are recorded and maintained. The charge states that the implementation of the CWS/CMS had an impact on bargaining unit employees, including workload, changes in job scope and duties, and adequate staffing.

Beginning in late 1998 and continuing through the early part of 2000, SEIU and Department representatives met and conferred over workload, staffing, compensation and the designation of appropriate classifications to perform CWS/CMS tasks. In early 1999, the parties reached an agreement to retain a consultant to conduct a study and make recommendations concerning implementation of the new computer system. After the study was issued, the parties met and conferred over an extended period of time concerning implementation of the recommendations in the report.

[1] The MMBA is codified at Government Code section 3500 et seq. The text of the MMBA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In October 1999, the City agreed that Class 1426 employees, Senior Clerk Typists, were no longer required to enter "contacts" into the CWS/CMS. There are approximately 35 Senior Clerk Typists in the Family and Children's Services Division. In an October 12, 1999 memo from Bill Bettencourt, Deputy Director of Family and Children's Services, to all staff, Mr. Bettencourt stated, in pertinent part:

> Effective immediately, staff no longer have to enter contacts on the CWS/CMS system. Documentation will only be done on form 1037 and kept in the case file.
>
> It is clear from the recently completed IBM study that the entering of contacts is a significantly problematical area. I will be advising the state that we are no longer going to enter contacts into the system until such time that the system functions as it should.
>
> On Friday, Jan and I met with representatives of Local 535 and Local 790 to review the report of the recent study done by IBM. We will begin working together on the recommendations of that report in order to address the problem areas noted.

In a letter to Jan Esbaugh, Program Director of the Family and Children's Services Division, dated March 6, 2000, SEIU attorney Vincent Harrington summarized the agreements reached by the parties during their prior meetings.

On March 24, 2000, SEIU and Department representatives met to review SEIU's March 6, 2000 letter. With certain minor clarifications, the parties reaffirmed their agreement on the issues contained in the letter.[2] Only two issues remained for further discussion: reorganization of the clerical staff and the feasibility of re-establishing a Class 2904 employee in each unit, as well as a Class 1426 clerical floater position. These issues were dependent upon appropriate budgetary resources being made available within the City.

Beginning in the summer of 2001, the City began rescinding or renouncing agreements previously reached concerning the duty functions of employees in Class 1426. On an unspecified date, the City reneged on the agreement that entering contacts into the CWS/CMS is not a duty function of Class 1426 employees. The charge does not explain what action or policy was issued by the City concerning this matter. It is assumed that Class 1426 employees are now required to enter contacts into the CWS/CMS system.

---

[2] The charge does not include either a copy of a signed written agreement or a tentative agreement which has been initialed by the parties.

The charge states that in a letter to SEIU representative Faye Roe, dated September 25, 2001, Patricia Burns, Employee Relations Manager, refused to meet and confer with the Union. Ms. Burns stated, in pertinent part:

> I also discussed meeting again with members of the management team, and our position continues to be that we have exhausted our discussions on this matter, as we stated in our last meeting. We met outside of an obligation to meet and confer, since the introduction of CMS was not a significant change affecting the working conditions of employees. We continue to disagree on that and other issues involving the duties of the 1426 classification.

Based on the facts stated above, the charge fails to state a prima facie case.

In determining whether a party has violated Government Code section 3505 and PERB Regulation 32603(c),[3] PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.)[4] Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; Walnut Valley Unified School District (1981) PERB Decision No. 160; San Joaquin Co. Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813; Grant Joint Unified High School District (1982) PERB Decision No. 196.) The direction of the work force and the determination of work to be performed is a management prerogative and is not subject to negotiations if the newly assigned duties are reasonably comprehended within the scope of existing duties. (Davis Joint Unified School District (1984) PERB Decision No. 393; Rio Hondo Community College District (1982) PERB Decision No. 279.)

The charge alleges that in October 1999, the City agreed that Class 1426 employees would not be required to enter contacts into the CWS/CMS system. Sometime during the summer of 2001, the City reneged on this agreement. It is presumed that the City began requiring Class 1426 employees to enter contacts into the case-tracking system. As noted above, however, the assignment of work is not a matter within the scope of representation, unless the newly assigned job duties are not reasonably related to the existing duties.

---

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[4] When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

Examples of the duties assigned to Class 1426 Senior Clerk Typists, from the "Characteristics of the Class" document submitted by the City include:

> • Complies and condenses technical and statistical data from various sources . . .
> • Types accounting and financial statements, letters, contracts, pay-rolls, receipt vouchers, departmental reports, permits and similar materials, frequently requiring the use of independent judgement.
> • Posts a variety of information and data in connection with the maintenance of office records; codes correspondence for files; assembles materials and information from various sources relative to the typing of various reports.

The Duty Statement for the 1426 Senior Clerk/Typist, dated April 27, 1998, provides, in part:

> • Maintain a current case record system. Utilize automated systems including CDS, CMS and other systems to maintain a current case record.
> • Print reports from CMS as directed by the Supervisor.
> • Enter record of contacts in the CMS notebooks from a hard copy as assigned by the supervisor. Enter changes from Form 1502 and Form 1132 into CMS notebooks as directed by the supervisor.
> • Make photocopies of various reports, documents and forms as specified on the copy docket.
> • Type brief memorandums, letters and various forms required by the Department and complete any other necessary clerical duties as requested by the Supervisor.
> • Attend training sessions as appropriate and approved.

As filed, the present charge does not provide facts which demonstrate that the requirement that Class 1426 employees enter contacts into the CWS/CMS system is not reasonably comprehended within the duties listed above. Thus, this allegation fails to demonstrate that the City unilaterally changed a matter within the scope of representation.

The charge also alleges that the City refused to meet and confer concerning the implementation of the CWS/CMS system.

An absolute refusal to bargain is a per se violation of the duty to bargain in good faith. (Stockton Unified School District (1980) PERB Decision No. 143; Dublin Professional Fire Fighters v. Valley Community Services District (1975) 119 Cal Rptr. 182.)

The charge alleges that beginning in late 1998 and continuing through the early part of 2000, SEIU and City representatives met and conferred over CWS/CMS implementation issues such as workload, staffing, compensation and the designation of appropriate classifications to perform CWS/CMS tasks. The charge also states that on March 24, 2000, SEIU and City representatives met to reaffirm the agreements set forth in SEIU's March 6, 2000 letter. These facts do not demonstrate that the City refused to meet and confer over the implementation of the CWS/CMS system. There are no facts alleged which demonstrate that SEIU otherwise made a demand to bargain a matter within the scope of representation which was refused by the City.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 14, 2002, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney